

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
May 11, 2004 Session

**STATE OF TENNESSEE v. JIMMY M. McCrARY, JR.**

**Direct Appeal from the Circuit Court for Rutherford County  
Nos. F53183A, F53594A, F53916, & F54156     Don Ash, Judge**

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**No. M2003-02087-CCA-R3-CD - Filed September 23, 2004**

Defendant, Jimmy M. McCrary, Jr., pled guilty to the following charges without a recommendation from the State as to sentencing: two counts of sale of .5 grams or more of cocaine in Case No. F53183A; one count of possession of .5 grams or more of cocaine with the intent to sell in Case No. F53594A; one count of sale of .5 grams or more of cocaine in Case No. F53916. Defendant also waived the presentment of Case No. F54156 to the Rutherford County grand jury and pled guilty to one count of sale of .5 grams or more of cocaine upon a criminal information. *See* Tenn. Code Ann. § 40-3-103. Each of the charged offenses is a Class B felony. As part of the plea agreement, the State agreed to the dismissal of count two of Case No. F53916 and count three of Case No. F53183A. Following a sentencing hearing, the trial court sentenced Defendant to an effective sentence of twenty-eight years as a Range I, standard offender. Defendant now appeals the length of his sentences in Case Nos. F53183A and F54156, and the trial court's order that his sentence in Case No. F54156 run consecutively to his sentences in Case No. F53183A. Defendant does not appeal the trial court's order that his sentences in Case Nos. F53183A and F54156 run consecutively to his sentences in Case Nos. F53594 and F53916. After a careful review of the record in this matter, we reverse the trial court's order that Defendant's sentence in Case No. F54156 run consecutively with his sentences in Case No. F53183A. We reverse the trial court's judgment as to sentencing in Case Nos. F53183A and F54156, and remand for a new sentencing hearing as to the length of the sentences in these cases. In all other aspects, the trial court's judgments are affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the  
Rutherford County Circuit Court Affirmed in Part and Reversed in Part**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, JJ., joined.

Matthew Mayo, Nashville, Tennessee, (on appeal) and William Kennerly Burger, Murfreesboro, Tennessee, (at trial) for the appellant, Jimmy M. McCrary, Jr.

Paul G. Summers, Attorney General and Reporter; Helena Walton Yarbrough, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; and J. Paul Newman, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

The State submitted the following factual basis in support of Defendant's convictions at the guilty plea submission hearing. For Case No. F53916, Defendant sold more than .5 gram of cocaine to a confidential informant in an electronically monitored sale on March 12, 2002. Regarding Case No. F5359A, deputies from the Rutherford County Sheriff's Department, responding to active warrants on Defendant and Jamie Timberlake on August 30, 2002, discovered a plastic bag with white powder believed to be cocaine and a bottle of pills believed to be Valium within Defendant's reach during a consensual search. Defendant was charged with felony possession and placed under arrest. Defendant was released later that day after posting bond. For Case No. F53183A, Defendant, while on bail, sold more than .5 grams of cocaine on October 9, October 18 and October 22, 2002 to a confidential informant during electronically monitored sales. For Case No. F54156, John Jones, a narcotics detective with the Murfreesboro Police Department, executed a search warrant on October 25, 2002, during which a plastic bag of cocaine was found in Defendant's pocket.

Detective Jones testified at Defendant's sentencing hearing that Defendant was previously arrested for the sale of narcotics in Case Nos. F53916 and F53594A and was on bail when he committed the offenses in Case Nos. F54156 and F53183A. Detective Jones said that he also received information that Defendant continued to sell drugs after Detective Jones' initial investigation was concluded.

On cross-examination, Detective Jones said that he was aware that Defendant's partner in some of the charged offenses, Jamie Timberlake, also was convicted of drug offenses that were committed while he was on bail for earlier drug related charges. Detective Jones said that he was aware that Mr. Timberlake received concurrent six-year sentences as a result of his plea agreement with the State. Detective Jones said that his investigation focused on Defendant because he was known as a major "drug player" in the area. He agreed that Mr. Timberlake had "a lot of [drug] convictions" compared to Defendant. Detective Jones said that he did not participate in the plea agreement entered into between the State and Mr. Timberlake.

On redirect, Detective Jones said that Mr. Timberlake had agreed to testify against Defendant as part of his plea agreement should the cases proceed to trial. Detective Jones reiterated that Defendant's name was the one that came up during his investigation, and Defendant was the one who handed the buyer the drugs and took the buyer's money. Detective Jones said that the drug problem in the community was increasing to the extent that twelve- and thirteen-year-old children were selling drugs.

Defendant testified that he completed the twelfth grade at Bellwood Christian Academy. Because the school's curriculum did not conform to state standards, Defendant was required to take the GED to proceed further with his education. Defendant said that he did not pass his GED but was steadily employed after that until he was injured on the job in October, 2000. Defendant suffered a deterioration of the necrotic bones in his hand as a result of the injury which Defendant said was

a very painful condition. Defendant had five surgeries on his hand and was currently taking lortab, oxycontin and trazadone. Defendant said that he has also taken percocet and mepergan in the past. Defendant said that he was not able to work because of his injured hands and lived with his parents. Defendant said that he did not own a car.

Defendant stated that he began using cocaine when the medications prescribed by his doctor no longer helped alleviate the pain from his hand injury. At first, Mr. Timberlake supplied him with cocaine at no charge. When his need for the drug increased, however, Defendant began selling cocaine to support his habit. All the money he received from his sales activities was used to purchase more cocaine. Defendant said that he continued to use and sell cocaine while on bond because of his addiction. Defendant admitted that this was a bad decision. On cross-examination, Defendant conceded that although Mr. Timberlake got Defendant more involved with drugs, his drug-related activities were not Mr. Timberlake's fault. Other than the charged offenses, Defendant said that he had sold drugs more than ten times.

The trial court sentenced Defendant to eight years for the conviction in Case No. F53916 and eight years for the conviction in Case No. 53594A. The trial court ordered the sentences in Case No. F53594A and Case No. F53916 to run concurrently. Without identifying which enhancement factors it relied upon, the trial court sentenced Defendant to ten years for count one and ten years for count two in Case No. F53183A. The trial court ordered the sentence in count one to run concurrently to the sentence in count two and consecutively to the sentences in Case Nos. F53916, F53594A and F54156. The trial court ordered the sentence in count two to run consecutively to the sentences in Case Nos. F53916 and F53594A. The trial court sentenced Defendant to ten years for the conviction in Case No. F54156 and ordered the sentence to run consecutively to counts one and two in Case No. F53183A and the sentences in Case Nos. F53594A and F53916 for an effective sentence of twenty-eight years.

Defendant agrees that the trial court was required to order the sentences for the offenses committed while on bail, Case Nos. F53183A and F54156, to run consecutively to the sentences in Case Nos. F53916 and F53594A pursuant to Rule 32(c)(3) of the Tennessee Rules of Criminal Procedure. Defendant argues, however, that the trial court erred in sentencing Defendant above the minimum sentence applicable in Case Nos. F54156 and F53183A and ordering the sentence in Case No. F54156 to run consecutively to the sentences imposed in Case No. F53183A.

When a defendant challenges the length or the manner of service of his or her sentence, this Court must conduct a *de novo* review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d); *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002). This presumption, however, is contingent upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). If the record fails to show such consideration, the review of the sentence is purely *de novo*. *State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The defendant bears the burden of showing that his sentence is improper. Tenn. Code Ann.

§ 40-35-401(d) Sentencing Commission Comments; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

At the conclusion of the sentencing hearing, the trial court stated:

So, in regard to the first two charges, I think are felony number, 535916, and felony number, 53594A, I'm going to sentence you to eight years on each one of those. And I'll run those two sentences concurrently. That's the minimum. I'm going to assess a \$2,000 fine on each one of those cases.

Then we have three other counts. And these were the sales that took place while you were out on bond and by law they've got to run consecutively with each other. And looking at the enhancement factors, I'm going to find that a ten year sentence is appropriate on each one of those sentences. And I've got three different counts on those. And the question is whether I should run those three counts concurrently with each other or run those consecutive. If I run those consecutive, sir, then you'd be looking at 38 years in the state penitentiary. And I don't know what I am going to do. I'll let you take a drug screen and I'll come back and make my decision.

Defendant was administered a drug screen test and tested positive for cocaine, morphine, and marijuana. After the test results were known, the trial court stated:

... I went through these various things in regard to rehabilitation and whether or not you were going to be able to practice good citizenship and all those other things. And taking all that into consideration, your first two eight year sentences, I'm going to run concurrently. The next three sentences, each one of those are going to be ten years. Two of those are going to run consecutively and the other one will run concurrently. That means it will be a total of 28 years in the state penitentiary, as a range one, 30 percent offender. I'm going to assess a fine of \$2,000, on each one of those cases. Do you understand that, sir?

Defendant was convicted of five Class B felonies as a Range I offender. The presumptive sentence is the minimum sentence within the range, or eight years, if there are no enhancement or mitigating factors. Tenn. Code Ann. §§ 40-35-112(a)(2) and -210(c). If there are enhancing factors present but no mitigating factors, the trial court may set the sentence above the minimum sentence but still within that sentencing range. *Id.* -210(d).

The trial court did not state which enhancement factors it was relying upon to elevate Defendant's sentences in Case. Nos. F53183A and F54156 from eight years to ten years. *See* Tenn. Code Ann. § 40-35-210(f). "To facilitate meaningful appellate review, the [Sentencing] Act provides that the trial court must place on the record its reasons for arriving at the final sentencing decision, *identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found* and articulate how the mitigating and enhancement factors have been

evaluated and balanced in determining the sentence.” *State v. Jones*, 883 S.W.2d 597, 599 (Tenn. 1994) (emphasis added). Because the trial court did not make any factual findings supporting enhancement of Defendant’s sentences in Case Nos. F53183A and F54156, and did not identify which enhancement factors it found applied, we reverse the judgment as to sentencing in Case Nos. F53183A and F54156, and remand for a new sentencing hearing as to the length of the sentences in those cases. We remand this for a new sentencing hearing as to the length of these sentences because the record reflects that certain facts, *if found by the trial court and articulated* in the trial court’s decision *might* support enhancement of the sentences. We further note, however, the imposition of the sentences should be done in light of *Blakely v. Washington*, 542 U.S. \_\_\_\_, 124 S. Ct. 2531 (2004).

The record is also silent as to the basis for the trial court’s imposition of consecutive sentencing in Case Nos. F54156 and F53183A. When a Defendant is convicted of multiple crimes, the trial court, in its discretion, may order the sentences to run consecutively if it finds by a preponderance of the evidence that a defendant falls into one of the seven categories contained in Tennessee Code Annotated section 40-35-115. The State argues that the record supports a finding that Defendant has an extensive criminal history and that he is a professional criminal whose criminal activities are a major source of the Defendant’s livelihood. Tenn. Code Ann. § 40-35-115(a)(1) and (2). The trial court, however, specifically found that Defendant’s prior criminal history was not significant and declined to consider the State’s argument that Defendant was a professional criminal as defined by the statute in determining whether to run Defendant’s sentences consecutively. Although it appears that the results of Defendant’s drug test played a significant role in the trial court’s considerations, the failure to pass a drug test prior to sentencing is not one of the seven enumerated factors that would support an order of consecutive sentences. *Id.* § 40-35-115. Because the trial court did not provide factual findings to support the imposition of consecutive sentencing in these cases, and no facts to justify the order of consecutive sentencing appear in the record, we reverse the trial court’s order that Defendant’s sentence in Case No. F54156 run consecutively with his sentences in Case No. F53183A.

## CONCLUSION

We reverse the trial court’s order that Defendant’s sentence in Case No. F54156 run consecutively with his sentence in Case No. F53183A since the record does not contain evidence that would support imposition of consecutive sentencing. We reverse the trial court’s judgment as to sentencing in Case Nos. F53183A and F54156, and remand for a new sentencing hearing as to the length of the sentences in these cases. In all other aspects, the judgments are affirmed.

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THOMAS T. WOODALL, JUDGE